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THE STATE GOVERNMENT OF SABAH & ANOR v. AB RAUF MAHAJUD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI FCJ
ANANTHAM KASINATHER JCA
B ABDUL AZIZ ABDUL RAHIM JCA
[CIVIL APPEALS NO: S-01-47-2010, S-01-48-2010, S-01-49-2010, S-01-10-01-2012 & S-01-11-01-2013]
26 JUNE 2015

C ***LAND LAW:*** *Native customary rights ('NCR') – Right to collect turtle eggs – Whether NCR under Sabah Land Ordinance – Activity of seasonal nature – Whether justified claim of continuous occupation – Declaration of Island as protected area – Whether extinguished NCR over land*

D ***NATIVE LAW AND CUSTOM:*** *Native customary right ('NCR') – Authority to occupy land – Right to collect turtle eggs – Whether NCR under Sabah Land Ordinance – Activity of seasonal nature – Whether justified claim of continuous occupation – Declaration of Island as protected area – Whether extinguished NCR over land*

E There were five appeals herein which were heard together, *inter alia* (i) Appeal No. 47 wherein the appellant, the State Government of Sabah, appealed against the decision of the High Court allowing the respondent, Ab Rauf Mahajud's ('Ab Rauf') claim in respect of the right to collect turtle eggs on Sipadan Island ('the Island'); (ii) Appeal No. 48 wherein the appellant, the Assistant Collector of Land Revenue, Semporna, Sabah, appealed against F the decision of the High Court allowing the respondent, Hj Abdillah Hj Abdul Hamid's ('Abdillah') claim for native customary right ('NCR') over the land and the right to collect turtle eggs on the Island; (iii) Appeal No. 49 wherein Ab Rauf appealed against the dismissal of his claim for NCR over a land on the Island and an injunction to prevent persons from conducting G business on the Island without his prior approval. The High Court however allowed Ab Rauf's claim in respect of the right to collect turtle eggs on the Island; (iv) Appeal No. 10 wherein the State Government of Sabah and the Board of Trustees of the Sabah Parks appealed against the dismissal of their appeal to the judge in chambers and affirmation of the decision of the Deputy H Registrar to award damages of RM4,376,008.75 to Ab Rauf for turtle eggs collection right with interest; and (v) Appeal No.11 wherein the Assistant Collector of Land Revenue, Semporna and the State Government of Sabah appealed against the dismissal of their appeal against the decision of the Deputy Registrar to award damages in the sum of RM5,524,711.04 to I Abdillah for lost of turtle eggs collection right and damages of RM26.5 million as damages for lost of native customary land, together with interest. Ab Rauf commenced the action for and on behalf of himself and as representatives of descendants of Maharaja Mahamud bin Singkalang,

claiming that he and his ancestors had exercised the right to collect turtles eggs at the Island on certain number of nights per year since the days of the Sultanate of Sulu reign and continued to do so during the British North Borneo Company Government until November 1993, when the Island was declared to be public reserve for bird sanctuary. Whereas, Abdillah claimed NCR over 2.5 acres of land on the Island which he said to have inherited from his father and grandfather. Abdillah also contended that he and his family had been collecting turtle eggs with the family of Ab Rauf for generations. On 24 September 1997, the Island was declared as a Protected Area and Protected Place under the Protected Areas Order 1997 ('the Order') and since then, the Island had been under the control of the Federal Government. With the declaration, Ab Rauf and Abdillah had not been allowed to collect turtle eggs on the Island. There were four main issues in these appeals: (i) whether Ab Rauf and Abdillah had acquired NCR over the land in question on the Island and whether the NCR still subsist; and if so, whether the NCR had been extinguished by the declaration of the Island as Protected Area or by the earlier declaration of the Island as public reserve for bird sanctuary; (ii) whether collection of turtle eggs is a NCR under the Sabah Land Ordinance; (iii) whether the correct parties were sued as the parties responsible for denying Ab Rauf and Abdillah from continuing to collect turtles' eggs on the Island and from continuing to carrying on tourism industry business on the Island; and (iv) whether the Ab Rauf and Abdillah were entitled to damages.

Held (allowing Appeal No 47 and 48 and Appeals No. 10 and No. 11; dismissing Appeal No 49)
Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) Section 15 of the Land Ordinance deals with possession by customary tenure and the use of land for cultivation or farming or rearing of live stocks or the usage of the land as burial grounds. It does not cover collection of turtle eggs, which by nature and by evidence, is seasonal. The seasonal nature of the activity could hardly justify the claim of continuous occupation that is necessary as one of the essential element under the Sabah Land Ordinance to establish a claim for NCR. Therefore, the so-called right to collect turtle eggs was not NCR and did not give Ab Rauf a stake to claim a NCR over the Island. (paras 31 & 34)

(2) Native customary rights will continue to exist and will override any written laws made thereafter. These rights are capable of registration although registration is not a pre-requisite to recognition in law of the existence of such rights. These rights, which were acquired or recognised before the passing of any legislation by a competent legislative body to curtail the rights, cannot be extinguished by the passing of such legislation unless there is express provision in the legislation to extinguish the rights. However, the issue of extinguishment

of native rights in so far as it relates to Ab Rauf's appeal did not arise as he had not established his claim for these rights over the Island. He and his ancestors only have rights to collect turtle eggs; and these rights did not fall within the ambit of NCR as recognised by the law of Sabah. (paras 39 & 40)

(3) Abdillah had established his native rights over 2.5 acres of land on the Island and his right to collect turtle eggs. However, since the declaration of the Island as a Protected Area pursuant to s. 4 of the Protected Areas and Protected Places Act 1959 ('the Act'), the Island has been under the control of the Federal Government. Pursuant to s. 9 of the Act, there is no longer free and unrestricted movement of person on the Island. Hence, although there is no express provision in the Order that declared the Island as protected area and protected place, this case was exceptional where the enjoyment of the usufructuary rights enjoyed by the Ab Rauf and Abdillah underlying the claim for NCR are, by operation of the legislative Order, terminated. (paras 41 & 43)

(4) There was no title registered in respect of the claimed NCR. It is the law that land over which NCR is claimed but no title had been issued remains as State land and therefore, the State of Sabah did not lose sovereignty over the Island by the declaration. However, the Federal Government or the Majlis Keselamatan Negara ('MKN') ought to have been made party to the actions. With the declaration of the whole Island of Sipadan as protected area and protected place, the control and permission in respect of any activities on the Island was vested with the Federal Government or through MKN. There was no evidence that Ab Rauf and Abdillah had been given any permission or consent to enter or to be on the Island to collect turtle eggs. (paras 45 & 46)

(5) Ab Rauf and Abdillah's claims were for declaration of their NCR on the Island and rights to collect turtle eggs and declaration that they had been deprived of the rights as well as damages for deprivation of their rights and trespass. They did not claim damages *in lieu* or alternative to their specific claims for turtle eggs/NCR. In fact, their claim was in addition to their specific claims for turtle eggs/NCR. There was no prayer for specific performance. In this regard, the preliminary objection as to the rights of Ab Rauf and Abdillah to claim for damages was dismissed as being of no merit. (paras 55 & 56)

(6) Pursuant to s. 70(2) of the Sabah Land Ordinance, all NCR land shall not be used for other than agricultural purposes. Although the NCR land owner may apply to the Minister for permission to use the land for some purposes other than agriculture, there was no evidence that Abdillah had applied for permission to convert the use of the land. Further, the restriction imposed by the declaration of the Island as protected area and protected place is applicable to the whole Island and not just the 2.5

acres belonging to Abdillah. Therefore, in awarding damages to Abdillah, it was not right to read too much into the potential of the land being developed as tourist attraction. In the circumstances, damages to be awarded to Abdillah, if at all, on the loss of NCR on the 2.5 acres land was only nominal. (para 67)

Bahasa Malaysia *Headnotes*

Terdapat lima rayuan di sini yang didengar bersama, antara lain (i) Rayuan No 47 di mana perayu, Kerajaan Negeri Sabah, merayu terhadap keputusan Mahkamah Tinggi membenarkan tuntutan responden, Ab Rauf Mahajud ('Ab Rauf') berkaitan hak memungut telur penyu di Pulau Sipadan ('Pulau'); (ii) Rayuan No. 48 di mana perayu, Penolong Pemungut Hasil Tanah, Semporna, Sabah, merayu terhadap keputusan Mahkamah Tinggi membenarkan tuntutan responden, Hj Abdillah Hj Abdul Hamid ('Abdillah') terhadap hak adat anak negeri (HAAN') terhadap tanah dan hak memungut telur penyu di Pulau tersebut; (iii) Rayuan No. 49 di mana Ab Rauf merayu terhadap penolakan tuntutannya bagi HAAN atas tanah di Pulau tersebut dan injunksi menghalang sesiapa menjalankan peniagaan di Pulau tersebut tanpa kebenarannya. Walau bagaimanapun, Mahkamah Tinggi membenarkan tuntutan Ab Rauf berkaitan dengan hak untuk memungut telur penyu di Pulau tersebut; (iv) Rayuan No. 10 di mana Kerajaan Negeri Sabah dan Lembaga Pemegang Amanah Taman-taman Sabah merayu terhadap penolakan rayuan mereka kepada hakim dalam kamar dan pengesahan keputusan Timbalan Pendaftar untuk mengawardkan ganti rugi sejumlah RM4,376,008.75 kepada Ab Rauf bagi hak memungut telur penyu dengan faedah; (v) Rayuan No. 11 di mana Penolong Pemungut Hasil Tanah, Semporna dan Kerajaan Negeri Sabah merayu terhadap penolakan rayuan mereka terhadap keputusan Timbalan Pendaftar mengawardkan ganti rugi sejumlah RM5,524,711.04 kepada Abdillah bagi kehilangan hak memungut telur penyu dan ganti rugi sejumlah RM26.5 juta sebagai ganti rugi bagi kehilangan tanah adat anak negeri, berserta faedah. Ab Rauf memulakan tindakan tersebut untuk dan bagi pihak dirinya dan sebagai wakil kepada waris-waris Maharaja Mahamud bin Singkalang, dengan menyatakan bahawa dia dan keturunannya melaksanakan hak memungut telur-telur penyu di Pulau tersebut pada beberapa malam tertentu setiap tahun semenjak zaman Kesultanan Sulu dan meneruskannya semasa Kerajaan Syarikat Berpiagam Borneo Utara British sehingga bulan November 1993, apabila Pulau tersebut diisytiharkan sebagai rizab am bagi lindungan burung. Sementara itu, Abdillah menuntut HAAN ke atas 2.5 ekar tanah di Pulau tersebut yang dikatakannya diwarisi daripada bapa dan datuknya. Abdillah juga menghujahkan bahawa dia dan keluarganya telah memungut telur penyu bersama-sama dengan keluarga Ab Rauf bagi beberapa generasi. Pada 24 September 1997, Pulau tersebut diisytiharkan sebagai Kawasan Larangan dan Tempat Larangan di bawah Perintah Kawasan Larangan 1997 ('Perintah tersebut') dan semenjak itu, Pulau tersebut diletakkan di bawah kawalan

Kerajaan Persekutuan. Dengan deklarasi tersebut, Ab Rauf dan Abdillah tidak dibenarkan memungut telur penyu di Pulau tersebut. Terdapat empat isu dalam rayuan-rayuan ini: (i) sama ada Ab Rauf dan Abdillah memperoleh HAAN terhadap tanah yang dipersoalkan di Pulau tersebut dan sama ada HAAN masih kekal; dan jika demikian, sama ada NCR telah lupus dengan perisytiharan Pulau tersebut sebagai Kawasan Larangan atau oleh perisytiharan terlebih awal Pulau tersebut sebagai rizab am bagi lindungan burung; (ii) sama ada pemungutan telur penyu adalah HAAN di bawah Ordinan Tanah Sabah; (iii) sama ada pihak yang betul disaman sebagai pihak yang bertanggungjawab melarang Ab Rauf dan Abdillah daripada meneruskan memungut telur penyu di Pulau tersebut dan daripada terus menjalankan perniagaan industri pelancongan di Pulau tersebut; dan (iv) sama ada Ab Rauf dan Abdillah berhak mendapat ganti rugi.

Diputuskan (membenarkan Rayuan No. 47 dan Rayuan No. 10 dan No. 11; menolak Rayuan No. 49)

Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 15 Kanun Tanah berkait dengan pemilikan tempoh pemegangan hak adat dan penggunaan tanah bagi pertanian dan perkebunan atau penternakan haiwan atau kegunaan tanah sebagai tempat pengkebumian. Ia tidak termasuk pemungutan telur penyu, yang secara semula jadinya dan mengikut keterangan, bermusim. Sifat bermusim aktiviti tersebut tidak menjustifikasi tuntutan pendudukan berterusan yang diperlukan sebagi salah satu unsur penting di bawah Ordinan Tanah Sabah untuk membuktikan tuntutan bagi HAAN. Oleh itu, hak memungut telur penyu bukan HAAN dan tidak memberikan Ab Rauf kepentingan untuk menuntut HAAN ke atas Pulau tersebut.

(2) Hak adat anak negeri wujud secara berterusan dan mengatasi mana-mana undang-undang bertulis yang dibuat kemudian. Hak-hak ini boleh didaftarkan walaupun pendaftaran bukan keperluan terdahulu untuk diiktiraf dari segi undang-undang bagi kewujudan hak sedemikian. Hak-hak ini, yang diperoleh atau diiktiraf sebelum mana-mana perundangan diluluskan oleh badan perundangan yang kompeten untuk menghadkan hak-hak tersebut, tidak boleh dihapuskan oleh kelulusan perundangan sedemikian kecuali terdapat peruntukan jelas dalam perundangan tersebut untuk menghapuskan hak itu. Walau bagaimanapun, isu penghapusan hak adat negeri setakat yang berkaitan dengan rayuan Ab Rauf tidak timbul kerana dia tidak membuktikan tuntutannya bagi hak ke atas Pulau tersebut. Dia dan keturunannya hanya mempunyai hak untuk memungut telur penyu; dan hak ini tidak terangkum dalam HAAN yang diiktiraf oleh undang-undang Sabah.

(3) Sebaliknya, Abdillah berjaya membuktikan hak anak negerinya terhadap 2.5 ekar tanah di Pulau tersebut dan haknya untuk memungut telur penyu. Walau bagaimanapun, semenjak perisytiharan Pulau tersebut

sebagai Kawasan Larangan menurut Akta Kawasan Larangan dan Tempat Larangan 1959 ('Akta'), Pulau tersebut berada dalam kawalan Kerajaan Persekutuan. Menurut s. 9 Akta, tiada lagi pergerakan bebas dan tidak terhad di atas Pulau tersebut. Dengan itu, walaupun tiada peruntukan jelas dalam Perintah tersebut yang mengisytiharkan Pulau tersebut sebagai kawasan larangan dan tempat larangan, kes ini adalah berkecuali di mana penggunaan hak terhad yang dinikmati oleh Ab Rauf dan Abdillah yang mendasari tuntutan bagi HAAN adalah, melalui operasi Perintah perundangan tersebut, terbatal.

(4) Tiada hak milik yang didaftarkan berkaitan HAAN yang dituntut. Undang-undang adalah bahawa tanah terhadap mana HAAN dituntut tetapi tiada hak milik dikeluarkan kekal sebagai tanah Negeri dan dengan itu Negeri Sabah tidak kehilangan kekuasaan terhadap Pulau tersebut dengan perisytiharan. Walau bagaimanapun, Kerajaan Persekutuan atau Majlis Keselamatan Negara ('MKN') sepatutnya dijadikan pihak kepada tindakan-tindakan tersebut. Dengan perisytiharan keseluruhan Pulau Sipadan sebagai kawasan terlarang dan tempat terlarang, kawalan dan izin berkaitan apa-apa aktiviti atas Pulau tersebut terletak hak dengan Kerajaan Persekutuan atau melalui MKN. Tiada keterangan bahawa Ab Rauf dan Abdillah diberikan apa-apa kebenaran atau izin untuk memasuki atau berada di Pulau tersebut untuk memungut telur penyu.

(5) Tuntutan Ab Rauf dan Abdillah adalah bagi deklarasi HAAN mereka atas Pulau tersebut dan hak memungut telur penyu dan deklarasi bahawa mereka dinafikan hak dan juga ganti rugi bagi penafian hak mereka dan pencerobohan. Mereka tidak menuntut ganti rugi sebagai ganti atau alternatif kepada tuntutan spesifik bagi telur penyu/HAAN. Pada hakikatnya, tuntutan mereka adalah sebagai tambahan kepada tuntutan spesifik bagi telur penyu/HAAN. Tiada permohonan bagi pelaksanaan spesifik. Dengan itu, bantahan awalan berkaitan dengan hak-hak Ab Rauf dan Abdillah untuk menuntut ganti rugi ditolak sebagai tidak bermerit.

(6) Menurut s. 70(2) Ordinan Tanah Sabah, kesemua tanah HAAN tidak boleh digunakan untuk tujuan selain daripada pertanian. Walaupun pemilik tanah HAAN boleh memohon kepada Menteri untuk kebenaran menggunakan tanah bagi tujuan yang selain daripada pertanian, tiada keterangan bahawa Abdillah telah memohon kebenaran untuk menukar kegunaan tanah. Selanjutnya, sekatan yang dikenakan oleh deklarasi bagi Pulau tersebut sebagai kawasan larangan dan tempat larangan adalah terpakai bagi keseluruhan Pulau bukan setakat 2.5 ekar yang dimiliki Abdillah. Oleh itu, dalam mengawardkan ganti rugi kepada Abdillah, potensi tanah tersebut dibangunkan sebagai tarikan pelancongan tidak wajar dipertimbangkan. Dalam keadaan tersebut, ganti rugi yang boleh diawardkan kepada Abdillah, jika ada, atas kehilangan HAAN bagi 2.5 ekar tanah adalah nominal.

Case(s) referred to:

Chua Kim Suan & Teoh Teik Nam (Suing As Administratrix and Administrator Respectively Of The Estate Of Teoh Tek Lee, Deceased) v. Government Of Malaysia & Anor [1994] 1 CLJ 321 SC ***(refd)***

Euro-Diam Ltd v. Bathurst [1988] 2 All ER 23 ***(refd)***

Sipadan Dive Centre Sdn Bhd & Ors v. The State Government of the State of Sabah [2011] 3 CLJ 308 HC ***(refd)***

Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Tham Cheow Toh v. Associated Metal Smelters Ltd [1972] 1 LNS 153 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 161A(5)

Land Ordinance (Sabah) (Cap 68), ss. 5, 15(a), (b), (c), (d), (e), (f), (g), 28(2), 65, 66, 70(2)

Protected Areas and Protected Places Act 1959, ss. 4, 9

Wildlife Conservation Enactment 1997 (Sabah), s. 84(1)(a)

(Civil Appeal No: S-01-47-2010)

For the appellants - Roderic Fernandez, Zaleha Rose Pandin, Dayangku Fazidah Hatun Pengeran Bagul; SSCs, State AG's Chambers, Sabah

For the respondent - Yunof Maringking; M/s Maringking & Co

(Civil Appeal No: S-01-48-2010)

For the appellants - Roderic Fernandez, Zaleha Rose Pandin, Dayangku Fazidah Hatun Pengeran Bagul; AG's Chambers, Sabah

For the respondent - Alex Decena & Shireen Sikayun; M/s Lee & Thong

[Editor's note: Appeal from High Court, Kota Kinabalu; Civil Suits No: K22-159-2006 & T21-58-2006 (overruled in part).]

Reported by S Barathi

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

Background

[1] There are five related appeals before us. The appeals are:

(a) Rayuan Sivil No. S-01-47-2010 (Appeal No. 47);

(b) Rayuan Sivil No. S-01-48-2010 (Appeal No. 48);

(c) Rayuan Sivil No. S-01-49-2010 (Appeal No. 49);

(d) Rayuan Sivil No. S-01-10-01/2012 (Appeal No. 10); and

(e) Rayuan Sivil No. S-01-11-01/2012 (Appeal No. 11).

All five appeals were heard together.

[2] In Appeal No. 47, the appellant (the defendant before the High Court) is the State Government of Sabah. The appellant is appealing against the decision of the learned High Court Judge allowing the respondent, Ab Rauf bin Mahajud's (the plaintiff before the High Court) (suing as representative of the descendants of Maharaja Mahamud bin Singkalang) claim in respect of right to collect turtle eggs on Sipadan Island ("the island") with costs to be taxed and damages to be assessed by the Deputy Registrar.

[3] In Appeal No. 48, the appellant, the Assistant Controller of Land Revenue, Semporna of Sabah (the defendant before the High Court), is appealing against the decision of the learned High Court Judge allowing the respondent, Hj Abdillah bin Hj Abdul Hamid's (the plaintiff before the High Court) claim for native customary right over land and the right to collect turtle eggs on the island and damages to be assessed by the Deputy Registrar.

[4] In Appeal No. 49, the appellant, Ab Rauf bin Mahajud, is appealing against the decision of the learned High Court Judge dismissing the appellant's claim for native customary right over land on the island and an injunction to prevent persons from conducting business on the island without prior approval of the appellant. The learned High Court Judge however allowed the appellant's claim in respect of right to collect turtle eggs and damages to be assessed by the Deputy Registrar. This appeal is related to Appeal No. 47.

[5] In Appeal No. 10, the first appellant is the State Government of Sabah and the second appellant is the Board of Trustees of the Sabah Parks (both were the defendants before the High Court) and they are appealing against decision of the learned judge in chambers dismissing the appellants' appeal to judge in chambers and affirming the decision of the Deputy Registrar to award damages of RM4,376,008.75 to the plaintiff Ab Rauf bin Mahajud (the plaintiff before the High Court) for turtle eggs collections right with interest. This appeal is related to Appeal No. 47 and Appeal No. 49.

[6] In Appeal No. 11, the first appellant, Assistant Collector of Land Revenue, Semporna and the second appellant the State Government of Sabah (both were the defendants before the High Court) are appealing against the decision of the learned judge in chambers dismissing the appellants' appeal to judge in chambers against the decision of the Deputy Registrar to award damages in the sum of RM5,524,711.04 to the plaintiff, Hj Abdillah bin Hj Abdul Hamid for lost of turtle eggs collection right and damages of RM26,500,000 as damages for lost of native customary land, together with interest. This appeal is related to Appeal No. 48.

[7] For convenience and ease of reference Appeal Nos. 47, 49 and 10 – collectively will be referred to as the "Rauf's appeal"; and Appeal Nos. 48 and 11 – collectively will be referred to as the "Abdillah's appeal". And the parties in these appeals shall be referred to as they were in the main suits before the learned Linton Albert J (as His Lordship then was).

[8] In the High Court, Rauf's appeal was registered as Suit No. SK22-159-2006 and Abdillah's appeal was registered as Suit No.T21-58-2006. Both suits were consolidated pursuant to a court order dated 24 August 2008 and heard together at the first instant at the High Court at Kota Kinabalu Sabah before the learned Linton Albert J. And after full trial, the learned Linton Albert J found in favour of the plaintiffs.

[9] Following the findings and the orders made by the learned Linton Albert J, the Deputy Registrar conducted the hearing for the assessment of damages and made those awards in damages as mentioned above in favour of the plaintiff (the respondent herein). The defendants (the appellants herein) appealed against the Deputy Registrar's decision on the award of damages to the judge in chambers at Kota Kinabalu High Court. The appeals were heard by the learned Abdul Rahman Sebli J, who dismissed the appeals and upheld the Deputy Registrar's orders as to damages.

[10] Not satisfied with the decisions, the defendants ie, the appellants in these appeals now appeal to the Court of Appeal. Hence, these appeals before us.

[11] Both the Rauf's appeal and the Abdillah's appeal concerned common issues and grounded on similar facts. The primary issue in both revolves around the right to collect turtle eggs on the island and the claim of native customary right over the land on the island.

[12] The brief material facts of the cases on appeals are these.

Brief Facts

[13] In Rauf's appeal, the plaintiff claimed to be the son of Mahajud bin Kaneh and whose uncle is Alukan bin Kaneh. The plaintiff commenced the action against the defendants for and on behalf of himself and as representatives of descendants of Maharaja Mahamud bin Singkalang. The plaintiff claimed and contended that he and his ancestors had exercised the right to collect turtle eggs at the island on certain number of nights per year since the days of the Sultanate of Sulu reign and continued to do so during the British North Borneo Company Government until November 1993.

[14] In Abdillah's appeal, the plaintiff claimed that he had native customary right over 2.5 acres of land on the island. He claimed that he had inherited 2.5 acres of land from his father who in turn had inherited it from his late father, the plaintiff's grandfather. On the land, stood a 'rumah warisan' together with a coconut orchard. The plaintiff said he inherited the 'rumah warisan' and the coconut orchard on the 2.5 acres land from his late father who passed away on 24 June 1993 and who had inherited it from the plaintiff's grandfather Tilaran bin Panglima Abu Sari who passed away on 26 June 1983. The plaintiff claimed that on the instruction of District Officer of Semporna, the 'rumah warisan' was demolished and on the same site on the 2.5 acres of land, a resort known as Abdillah Sipadan Resort was built. The plaintiff in Abdillah's appeal, also contended that he and his family had also been collecting turtle eggs with the family of Ab Rauf for generations.

[15] The plaintiffs in Rauf's appeal and Abdillah's appeal had apparently on 4 November 1993 entered into two agreements with Borneo Divers and Sea Sport (Sabah) Sdn Bhd, Pulau Sipadan Resort Sdn Bhd and Sipadan Dive Centre Sdn Bhd to immediately cease all collection of turtle eggs on the island for a period of four years from 4 November 1993 in consideration of an *ex gratia* payment of RM70,000 and an annual payment of RM50,000. The defendants were not parties to these agreements.

[16] However on 26 March 2004, the State Secretary issued a letter to the owner of all resorts in Sipadan, including the plaintiffs, to demolish all structures on the island and to vacate the island.

Legislative History Of Sipadan Island

[17] Historically, on 1 June 1917 the island was declared as a native reserve for the collection of turtle eggs by the Turtle Preservation Ordinance 1917. Subsequently, on 1 February 1933 the island was reserved as a bird sanctuary pursuant to s. 28 of the Land Ordinance (Sabah) (Cap 68). Nevertheless, the British Government graciously allowed the plaintiff's ancestors the right to collect turtle eggs thereon. It appears that even after formation of Malaysia in 1963, Ab Rauf's ancestors' rights to collect turtle eggs on the island was also recognised by the defendants.

[18] On 24 September 1997, the island was declared as a protected area and protected place under the Protected Areas Order 1994 and since then the island has been under the control by the Prime Minister's Department of the Federal Government. With the declaration, the plaintiffs have not been allowed to collect turtle eggs on the island.

[19] Since 1 February 1933 when the island was declared as reserve for public purpose for a bird sanctuary pursuant to s. 28 of the Sabah Land Ordinance *vide* Gazette Notification No. 69 of 1933. Subsection (2) of s. 28 of Sabah Land Ordinance provides that "when any land has been reserved under this or any previous Land Ordinance and such reservation has not been revoked, every disposition thereof, except for the purpose for which such reservation was made, shall be void".

Findings By The High Court

[20] Linton Albert J in a short judgment, but after a full trial, found for both plaintiffs in Rauf's appeal and Abdillah's appeal respectively. The learned judge ruled that the respective claim by Ab Rauf and Abdillah to the rights to collect turtle eggs are proven and upheld. However the learned judge rejected Ab Rauf's claim on the acquisition of native customary right over the whole island there being no or insufficient evidence to support such claim. The learned judge ruled that the mere fact that Ab Rauf was entitled to exercise the right to collect turtle eggs on the island for a specified number of days in a year, without more, falls short of the essential requirement for the establishment of native customary right over the island. The learned

judge was of the view that Ab Rauf lacked the requisite element of continuous occupation essential and sufficient measure of control over the area to establish native customary right over the whole island.

[21] With regard to Abdillah's claim of native customary right over the 2.5 acres of land on the island, the learned judge found that there was incontrovertible evidence of continuous occupation as evidenced by the existence of rumah warisan and the coconut orchard and the right to collect turtle eggs was exercised by Abdillah's ancestors.

[22] Therefore, the learned High Court Judge allowed Abdillah's claim as to native customary right over the 2.5 acres land on the island as well as the right to collect turtle eggs.

[23] The learned judge also ordered that damages be assessed by the Deputy Registrar.

The Defendants' Contentions

[24] In the appeals before us, the defendants advanced three principal arguments. Firstly, the plaintiffs, Ab Rauf and Abdillah did not have any claim to the native customary rights over land on the island; and even if they had, such rights had been extinguished by operation of law when the island was declared as protected area and protected place under the Protected Areas and Protected Places Act 1959. Secondly, the right to collect turtle eggs on the island is not a native customary right and does not amount to one and therefore the plaintiffs are not entitled to the award damages for the prohibition of that rights. Thirdly, the plaintiffs had sued the wrong parties. It was contended that the State Government of Sabah, the Board of Trustees of the Sabah Parks and the Assistant Collector of Land Revenue, Semporna are the wrong parties to be sued. It was contended that the right party to be sued is the Federal Government who had declared the island as a protected area in 1997.

The Issues In These Appeals

[25] There are four main issues before us common to all the appeals. The first issue is whether the plaintiffs in Rauf's appeal and Abdillah's appeal have acquired native customary rights over the land in question on the island and whether the native customary rights still subsist; and if so, whether the native rights have been extinguished by the declaration of the island as protected area pursuant to the Protected Areas Order 1994 or by the earlier declaration of the island as public reserve for bird sanctuary. The second issue is whether collection of turtle eggs is a native customary right under the Sabah Land Ordinance. Thirdly, whether the defendants are the correct parties to be sued as the parties responsible for denying the plaintiffs from continuing to collect turtle eggs on the island to carrying on tourism industry business on the island. Fourthly, whether the plaintiffs are entitled to damages.

Our Opinions

[26] With regard to the first issue and Ab Rauf's claim as to the native customary right over land on the island based on his pleaded claim for a declaration that he and his families who are descended of Maharaja Ligaddung Samang have a permanent heritable and transferable rights of used and occupancy on the island by virtue of ss. 65 and 66 of the Sabah Land Ordinance read together with art. 161A(5) of the Federal Constitution, the learned judge found that there is no merit to the claim. The learned judge found that Ab Rauf had not proven the essential requirements for the establishment of native customary right; in particular the element of continuous occupation on the island or any part thereof.

[27] Under the Sabah Land Ordinance, s. 65 defines customary tenure to mean "the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years or by title under this Part or under the Poll Tax Ordinance, or Part IV of the Land Ordinance, 1913". The existence and subsistence of native customary right is recognised under the Sabah Land Ordinance if certain features or factors in relation to the rights can be established. These features or factors are stated in s. 15 of the Sabah Land Ordinance as follows:

> Section 15: Native customary rights shall be held to be:-
>
> (a) land possessed by customary tenure;
>
> (b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;
>
> (c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property;
>
> (d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;
>
> (e) land that has been cultivated or built on within three years;
>
> (f) burial grounds or shrines;
>
> (g) usual rights of way for men or animal from rivers, roads, or houses to any or all of the above.

[28] Therefore, by virtue of s. 15 and s. 65, the plaintiff in Rauf's appeal must prove, *inter alia,* that he has a customary tenure by way of continuous occupation of the land on the island. In our view, the requirement of the nature of evidence specified in s. 15(b) to (g) of the Land Ordinance is a manifestation of the fact of continuous occupation of the land; and we read those requirements disjunctively and not conjunctively. In this respect, the learned judge had made a finding of fact after he had heard the witnesses and the evidence, oral and documentary, that were produced before him and concluded that the plaintiff in the Rauf's appeal had not shown any evidence

of continuous occupation or any of the requirement listed in s. 15 of the Land Ordinance to establish his claim as to the native customary right over the land on the island. It is trite law that the appellate court is slow to disturb the finding of facts by the trial court who had had the advantage of hearing and seeing the witnesses.

[29] As for for Abdillah's appeal and Abdillah's claim to native customary right, the learned judge found on the evidence, and we think rightly so, that the plaintiff, Abdillah had shown very strong evidence of continuous occupation of a specified area on the island measuring 2.5 acres to establish his claim on native customary right and tenure. The evidence shows that Abdillah had inherited from his father who in turn had inherited from his grandfather a "rumah warisan" and a coconut orchard on the said piece of land on the island. So, there is no dispute that based on this evidence, Abdillah had a native customary right on the 2.5 acres of land.

[30] However, the critical issue in Ab Rauf's claim is whether the alleged right to collect turtle eggs can be regarded as a native customary right under s. 15 of the Sabah Land Ordinance and thereby give rise to the claim of customary tenure. This issue is also relevant to Abdillah's claim of his right to collect turtle eggs.

[31] It is noted that s. 15 of the Land Ordinance deals with possession by customary tenure and the used of land for cultivation or farming or rearing of live stocks or the usage of the land as burial grounds. The section does not cover collection of turtle eggs which by nature, and by evidence in this case is seasonal. According to the evidence of the plaintiff, the plaintiff and his families were allowed to collect turtle eggs only for a number of days in a year. This, in our view, and as found by the learned judge, is insufficient to establish the evidence of the pre requisite evidence of continuous occupation of the land. Therefore, we agree with the learned judge that the so-called right to collect turtle eggs is not a native customary right and does not give the plaintiff, Ab Rauf a stake to claim a native customary right over the island of Sipadan.

[32] However, the learned judge held that the plaintiff, Ab Rauf and his families had been collecting turtle eggs on the island ever since the British days. Even when the island was declared as a Public Reserve For Bird Sanctuary in 1933, the plaintiff and his families were not prevented from continuing to collect turtle eggs. In the circumstances, the learned judge held that since the collection of turtle eggs is a source of income for the plaintiff, Ab Rauf and his families, the prohibition of that purported right without any compensation is wrong. Hence, the award for the assessment of damages in respect of the loss of rights to collect turtle eggs. We will address the issue whether this part of the court order (as to the award of damages) is correct in the later part of this judgment.

[33] As for Abdillah's right to collect turtle eggs, the arguments and reasoning by the learned trial judge in his judgment and his findings in respect of the same right claimed by Ab Rauf are equally applicable.

[34] In our view, the learned judge has correctly addressed this issue by referring to s. 15 and s. 65 of the Sabah Land Ordinance. There is no dispute that collection of turtle eggs is seasonal. In fact, by their own evidence the plaintiffs admitted that they collected turtle eggs only four times a year. The seasonal nature of the activity could hardly justify the claim of continuous occupation by the plaintiffs that is necessary as one of the essential element under Sabah Land Ordinance to establish a claim for native customary right. We therefore agree with the conclusion reached by the learned judge after he had considered all the evidence and the law on the subject that collection of turtle eggs is not a native customary right.

[35] The question is whether these rights (particularly the native customary right over the land claimed by Abdillah) have been extinguished by operation of law. We will address this question below.

[36] The defendants contended that the right has been extinguished. It was argued for the defendants that the right was extinguished from 1 February 1933. This is because on that date the Sabah Government of the day had issued a Gazette Notification No: 69/1933 putting the whole of Sipadan Island for a public purpose reserved for a bird sanctuary pursuant to s. 28 of the Land Ordinance. The section states:

> (1) The Yang di-Pertua Negeri may reserve any State lands which in his opinion are required for any public purpose or for residential reserve. Such reservation shall fully describe the land and the purpose for which it is reserved and shall be conclusive evidence that the land is reserved for a public or residential purpose.
>
> (2) where any land has been reserved under this or any previous Land Ordinance and such reservation has not been revoked, every disposition thereof, except for the purpose for which such reservation was made, shall be void.

[37] Section 5 of the Land Ordinance provides that the entire property in and control of State land or reserved land for a public purpose shall be vested solely in the Government. Therefore, it was contended for the defendants that by virtue of the declaration of the public purpose (as birds sanctuary) of the island and s. 5 of the Land Ordinance, the whole island is vested in the State Government from the date of the declaration.

[38] The learned judge rejected this contention and arguments. He referred to the headnotes in the Federal Court's case of *Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509, to conclude that the arguments and contentions advanced by the defendants are patently unsustainable. The relevant headnotes in that case referred to by the learned judge reads as follows:

(1) The proposition of law as enunciated in the cases of *Adong Kuwau* (*supra*) and *Nor Anak Nyawai* (*supra*) reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brenann J, Mason CJ and McHugh J, concurring, in the Australian case of *Mabo (No.2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire beneficial ownership of the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijaniv Secretary, Southern Nigeria*, where the Privy Council in an appeal from the Supreme Court of Nigeria held that radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants mush be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes. Although the instant case dealt with individual rights and not communal rights, the principle applicable was the same. *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (foll); *Mabo (No. 2)* (foll); *Amodu Tijani v. Secretary, Southern Nigeria* (foll). (paras 22 & 23).

(2) Native holdings are not only recognised by the 1920 Regulations, but where possible, such holdings may even be registered. Registration, however, is not a-necessary prerequisite for such holdings to be recognised. In the light of this, it was erroneous to hold, as was held by the learned Judicial Commissioner in the present case, that native customary rights in Sarawak were only created by s. 66 of the Ordinance. What s. 66 purported to do was to stipulate new conditions before native customary rights could be recognized after the coming into force of the Ordinance. It does not purport to nullify native customary rights that had been acquired or recognized prior to the coming into force of the Ordinance. In other words, it has no retrospective force. The plaintiff's claim in this case arose from circumstances which occurred prior to the Ordinance, since his father and his forefather had been in occupation of the said land prior to 1922. It was not in dispute that the plaintiff was born on the said land in 1922.

(3) ...

(4) ...

(5) ...

(6) ...

(7) ... this court wholly agreed with the view expressed in *Adong Kuwau* (*supra*) and *Nor anak Nyawai* (*supra*) that common law respects the pre-existence of rights under native laws or customs.

[39] The above passage quoted by the learned judge from the Federal Court's case of *Madeli Salleh* (*supra*) had clearly laid down the law as to nature of native customary rights in that native customary rights will continue to exist and will override any written laws made thereafter. These rights are capable of registration. However, registration of these rights is not a pre requisite to recognition in law of the existence of such rights. And these rights, which were acquired or recognised before the passing of any legislation by a competent legislative body to curtail these rights, cannot be extinguished by the passing of such legislation unless there is express provision in the legislation to extinguish the rights.

[40] In this regard, the issue of extinguishment of native rights insofar as it relates to Rauf's appeal does not arise at all. The learned judge had found that Ab Rauf has not established his claim for these rights over the island. He and his ancestors only have rights to collect turtle eggs; and these rights do not come within the ambit of native customary right as recognised by the law of Sabah.

[41] However, with regard to the Abdillah's appeal, the issue is more complicated. The learned judge found on evidence that Abdillah had successfully established his native rights over 2.5 acres of land on the island and his right to collect turtle eggs, with which findings we agree. It was argued that the native rights or usufructuary rights enjoyed by the natives are common law rights that pre-dates any statutory law and therefore can be taken away only 'clear and unambiguous words in the legislation'. Relying heavily on *Madeli Salleh*'s case (*supra*) it was submitted that declaring the island under s. 28 of the Sabah Land Ordinance as reserve for bird sanctuary (GN 69/1933) and the ban on the collection of turtle eggs on the island pursuant to s. 84(1)(a) of the Sabah Wildlife Conservation Enactment 1997 and the declaration of the island as protected area and protected place under s. 4 of the Protected Areas and Protected Places Act 1959 do not extinguish the native customary right enjoyed by the plaintiff. It was argued that the three statutes have no retrospective effect and contain no express provisions extinguishing these rights.

[42] It is arguable whether the creation of reserve for bird sanctuary over the island under s. 28 of the Sabah Land Ordinance extinguished native customary right of the plaintiff over the 2.5 acres land identified on the island. This is because such declaration is only a declaration of the status of the island and does not affect the occupation of the island by the plaintiff. At the most the declaration may only empower the controlling officer, named to manage the declaration, to regulate and monitor the activities on the island insofar as those activities may adversely affect the island as a bird sanctuary.

[43] However, the declaration of the island as a protected area by the Protected Areas Order 1994 on 24 September 1997, pursuant to s. 4 of the Protected Areas and Protected Places Act 1959 changes the equation dramatically. Firstly, since then the island has been under the control of the

Federal Government through the office of the Prime Minister's Department. Secondly, no one is permitted to be on the island for whatever reason unless the person is properly authorised and movement and conduct of such person may be controlled. Section 9 of the Act provides that "Any person who attempts to enter or who is in the protected area or protected place and who fails to stop after being challenged three times by an authorised officer so to do may be arrested by force, which force may if necessary to effect the arrest extend to the voluntary causing death". This means that there is no longer free and unrestricted movement of person on the island and the control over activities on the island is now with the Federal Government.

[44] The plaintiffs however argued that the declaration of the island as protected area and protected place does not extinguish their native customary rights on the island because there is no express provision in the Order that declared the island as protected area and protected place. We are not convinced. We think that this is one of the exceptional case where the enjoyment of the usufractuary rights enjoyed by the plaintiffs underlying the claim for native customary rights are, by operation of the legislative order, terminated.

[45] Our reasons for saying so are these. Firstly, there is no title registered in respect of the claimed native customary right. Though earlier we have said that we agreed with the learned trial judge that registration is not a prerequisite to the recognition of the native customary right, the circumstances of this case require the court to take into consideration the fact that there is no registration of the native customary right. There is no land title issued under the Sabah Land Ordinance in respect of the 2.5 acres of land which Abdillah claimed to have inherited from his great grandfather. The relevance of the registration in this instant is this; and this is our second reason for saying that Abdillah's enjoyment of his native customary right had been terminated by the declaration of the island as protected area and protected place. By its very nature, the usufractuary rights underlying the claim for native customary right in this instant is the right to use and to enjoy the benefits on the land without actually being the owner of the land. Section 66 of the Sabah Land Ordinance very clearly states that this right is a right of use and occupancy *albeit* a permanent and transferable right. It is the law that land over which native customary right is claimed but no title had been issued remains as State land. The plaintiff, Abdillah in his learned counsel's submission conceded that with the island being gazette as bird sanctuary in 1933 and now as a "park" it is unlikely that a land title would be issued over the 2.5 acres land. What more with the declaration of the island as protected area and protected place. With the declaration of the whole island of Sipadan as protected area and protected place, this right of use and enjoyment of the benefit to the land has been put to a stop. No person can now enter or be on the island to collect turtle eggs or to carry out other activities without the risk of being arrested or shot.

[46] With regard to the third issue, the defendants argued that the plaintiffs had sued the wrong party. It was submitted that it was the act of the Federal Government that declared the island as protected area and protected place under s. 4 of the Protected Areas and Protected Places Act 1959 (Act 298) that put a stop to the plaintiffs' right to collect turtle eggs and extinguished the plaintiffs' NCR claim on the island. In respond to this argument, the plaintiffs referred to the case of *Sipadan Dive Centre Sdn Bhd & Ors v. The State Government of the State of Sabah* [2011] 3 CLJ 308, where the High Court held that "... the fact that Pulau Sipadan was declared a protected area does not mean that the defendant has given up sovereignty of the island as ownership remains with the defendant. To sustain the contention of the defendant would mean that the Federal Government could turn any State land into Federal land by a mere declaration pursuant to Protected Areas and Protected Places Act. That is not and cannot be the status of the relationship between the Federal and State governments.", and argued that it is not necessary to name the Federal Government or the Majlis Keselamatan Negara (MKN) as a party to these actions. We however hold a different view. Though we agree with the High Court in *Sipadan Dive Centre Sdn Bhd & Ors* (*supra*), that the State of Sabah does not lose sovereignty over the island by a mere declaration of the island as protected area and protected place, we are of the view that the Federal Government or the MKN ought to be made a party to these actions. The reason is simple enough. With the declaration control and permission in respect of any activities on the island is now vested with the Federal Government or through MKN, which represent the Federal Government on all security matters. Furthermore, it is a fact that commencing from the date of declaration, the island was put off limits to all persons unless they are properly authorised or given consent to be on the island to carry out any authorised or permitted activities. In this regard, we have not been shown any evidence that the plaintiffs had been given any permission or consent to enter or to be on the island to collect turtle eggs.

On The Issue Of Damages

[47] Next, we come to the fourth and final issue that is on the plaintiffs' entitlement to damages for the loss of rights to collect turtle eggs and, in respect of Abdillah's appeal, loss of native customary right.

[48] The appeal by the plaintiffs with regard to the damages in this case flows from the order of the learned High Court Judge Linton Albert J who found that both the plaintiffs Ab Rauf and Abdillah had established their rights to collect turtle eggs on the island, and in respect of Abdillah's appeal, the learned judge also found that he had established a claim to native customary rights over 2.5 acres on the island. The learned judge had also ordered that the damages be assessed by the Deputy Registrar.

[49] In assessing the damages, the Deputy Registrar had awarded the sum of RM4,376,008.75 and the sum of RM5,524,711.04 to Ab Rauf and Abdillah respectively as damages for loss of turtle eggs collections rights. In addition, the Deputy Registrar also awarded Abdillah a sum of RM26.5 million as damages for loss of 2.5 acres native customary land. The Deputy Registrar also ordered interest at 8% per annum on the damages assessed effective from the date of judgment ie, 15 December 2009 to the date of satisfaction with cost of assessment to be taxed unless otherwise agreed.

[50] The defendants' appeal to the judge in chambers on the assessment of damages by the Deputy Registrar was dismissed by the learned Abdul Rahman bin Sebli J. Hence, this appeal on damages.

[51] In dismissing the appeal to the judge in chambers as to the quantum of damages, the learned judge found no merits in the defendants' appeal for the following reasons:

(a) the court could not accede to the defendants' argument that since the collecting and selling of turtle eggs have now been made illegal by legislation, the plaintiffs are not entitled to compensation. The trial judge had made a clear finding that the plaintiffs had customary rights to collect the turtle eggs and it cannot be disputed that this was one of their source of livelihood. Further, the evidence of the plaintiffs' witnesses, in particular the expert evidence of PW3 on the potential market value of the 2.5 acres of land were neither contradicted nor seriously challenged by the defendants at the hearing. Therefore their testimonies must be accepted;

(b) the learned judge agreed with the learned Deputy Registrar in dismissing the defendants' preliminary objection which is that the plaintiffs are not entitled to damages because in their statement of claim the plaintiffs prayed for specific relief for the right to collect turtle eggs and the native customary rights over land, and the court in granting the plaintiffs' claim did not order damages *in lieu* of specific performance as prayed by the plaintiffs. The plaintiffs by claiming damages are now converting the specific relief and NCR claim into a monetary claim; and

(c) on the merit of the appeal, the learned judge said he was guided by the principle cited in *Australian Civil Procedure*, Bernard Cairns, English Edition as follows:

> Generally, however, an appeal court is reluctant to upset an award unless the appellant can show that a mistake vitiates the decision. The nature of a decision on damages is different from an ordinary finding of fact in that a finding of fact is not an opinion or an value judgment. A decision on quantum is an opinion or a value judgment. An appellate court is therefore normally slow to interfere: *Davies v .Powell Duffryn Collieries Ltd* [1942] Ac 601 at 616. Decisions on

quantum closely resemble the exercise of discretion. The principles for reviewing quantum decisions are similar to those for reviewing a discretion: *Calder v. Boyne Smelters Ltd* [1991] 1 Qd R 325.

[52] We have closely scrutinised the grounds of judgment by the learned judge in dismissing the defendants' appeal to judge in chambers on quantum of damages. We observe that the learned judge had not adequately and critically scrutinised or analysed the evidence upon which the Deputy Registrar had based on his computation of the quantum of damages awarded to the plaintiffs. The learned High Court Judge also had not judiciously considered or give judicial appreciation to the fact that the island had been declared as reserve for bird sanctuary and also had been declared as protected area and protected place and as to how these circumstances affects the quantum of damages to be awarded to the plaintiffs. The learned High Court Judge also had not expressed any opinion as to whether the Deputy Registrar had given a proper and adequate judicial appreciation of these circumstances in awarding the amount of damages to the plaintiffs. The learned High Court Judge also had not addressed the issue as to how the fact that collection of turtle eggs had become illegal with the coming into force the Sabah Wildlife Conservation Enactment 1997 impacted the quantum of damages or the right to claim damages at all.

[53] Before us, the defendants repeated and adopted their submissions before the Deputy Registrar and before the learned judge in chambers in arguing the appeal against the quantum of damages awarded to the plaintiffs.

[54] Before we go in greater details as to the submissions of the parties on the issues of damages, we will address the preliminary objection by the defendants as to the rights of the plaintiffs to claim for damages. First of all, we will state that the law is quite settled that native customary rights cannot be abolished or extinguished without adequate compensation.

[55] With respect to the preliminary objection, the defendants submitted that by looking at the claims filed by Ab Rauf and Abdillah, they did not claim damages *in lieu* or alternative to their specific claims for turtle eggs/NCR. Their claim for damages was in addition to their specific claims for turtle eggs/NCR. The court awarded Ab Rauf the specific relief of turtle eggs and damages and Abdillah the specific relief of turtle eggs/NCR and damages. Instead of enforcing their specific relief the plaintiffs are now attempting to assess damages *in lieu*/alternative to their specific right to the turtle eggs/NCR awarded by the court. They are converting the specific relief of turtle eggs/NCR into a monetary sum. It was submitted that one cannot convert an award of a specific remedy into another remedy. For example, when a plaintiff claims specific performance and the court grants specific performance, he cannot then convert it into damages.

[56] We have a close look at the prayers by Ab Rauf and Abdillah in their respective pleadings. We observe that the thrust of the claim and relief sought by both plaintiffs are twofold. First, plaintiffs' claimed for declaration of their native customary rights on the island and declaration of their rights to collect turtle eggs. The plaintiffs also sought declaration that the defendants have deprived them of these rights. Second, the plaintiffs sought damages for deprivation of their rights and trespass. There was no prayer for specific performance. In this regard, we are of the view that the Deputy Registrar was correct to dismiss this preliminary objection as being of no merit.

[57] Having said that and having acknowledged that any extinguishment of native customary rights which have accrued and recognised (such as the right to collect turtle eggs) cannot be taken away without adequate compensation; the question that we need to address is whether in the circumstances of these appeals, the plaintiffs are rightly awarded the amount of damages as ordered by the Deputy Registrar.

[58] The object of assessment of damages is to put the injured party in the same position, insofar as award of money could do, he would have been in if he had not suffered the wrong but he is not to be allowed to profit by or out of it: see *Tham Cheow Toh v. Associated Metal Smelters Ltd* [1972] 1 LNS 153; [1972] 1 MLJ 171.

[59] However, it is also the law that in assessment of damages, a party against whom the damage is assessed may put a defence of *ex turpi causa* which rests on a principle of public policy that the court will not assist a party who has been guilty of illegal (or immoral) act of which the courts should take notice: See *Euro-Diam Ltd v. Bathurst* [1988] 2 All ER 23. Our then Supreme Court in *Chua Kim Suan & Teoh Teik Nam (Suing As Administratrix and Administrator Respectively Of The Estate Of Teoh Tek Lee, Deceased) v. Government Of Malaysia & Anor* [1994] 1 CLJ 321; [1994] 1 MLJ 394 had disallowed the claim for damages related to illegal operation of a taxi on the ground of public policy because it was a claim for loss of income from an illegal source.

Ab Rauf's Claim For Damages

[60] With regard to Ab Rauf's claim for damages on loss of right to collect turtle eggs, the learned Deputy Registrar had accepted without question the evidence of PW1 (ie, Ab Rauf) that prior to 1993, he used to collect between 160,000 to 240,000 eggs for each year and had sold them at RM0.50 a piece. The defendants submitted that the evidence adduced by the plaintiff is insufficient to discharge the burden by the plaintiff to prove damages. One of the evidence which was put to the Deputy Registrar was a record of turtle eggs collected and a number of turtles that came ashore to lay eggs in 1991. According to the record, for whatever it is worth, between January to December 1991 there were 137 turtles landed in Sipadan out of which 88

were said to have laid their eggs. The total eggs collected for the same period ranged from 19,138 eggs (in January) to 12,148 eggs (in December) per month. Between May and July, the number of eggs collected ranged from 13,548 eggs and 12,958 eggs per month (see p. 139 of appeal record part C in Appeal No: 10). This record was sent to Pejabat Hidupan Liar Daerah Semporna which forwarded it to Pegawai Daerah Semporna by letter dated 23 February 1992. However, neither Pejabat Hidupan Liar Daerah, Pulau Sipadan nor the Pejabat Daerah Semporna had verified or confirmed that accuracy of the record. It is also to be noted that this record was handwritten. Though it had an endorsement by way of signature of Pegawai Penguasa Hidupan Liar, there is no evidence adduced to verify the accuracy of the details of the report. The other evidence which Ab Rauf had produced to support his income claim from the right to collect turtle eggs is an agreement dated 1 February 1982 whereby he had farmed out the right to collect turtle eggs to several parties at the rate of RM15 per night during Musim Selatan (South West Monsoon) period and at the rate of RM5 during Musim Utara (North East Monsoon). These records are old records. They dated back to 1982 and 1992 respectively. There is no record of turtles landing or the number of eggs laid from the period the island was declared as protected area and protected place in 1997 until the date of filing of the claim.

[61] There was also the sale and purchase agreement dated 14 November 1993 (see p. 142 of the appeal record part C Case No. 10) between Borneo Divers and Sea Sports (Sabah) Sdn Bhd, Pulau Sipadan Resort & Tours Sdn Bhd and Sipadan Dive Centre Sdn Bhd which were described in the agreement as the purchasers and one Alukan bin Kaneh and Munting bin Pg Abu Sari who were described in the agreement as vendor, for the purchase of turtle eggs in consideration of annual payment of RM50,000 to the vendors by the purchasers. The agreement was for four years from the date of the execution and during the currency of the agreement, the vendors were not allowed to collect or remove any turtle eggs and whatever turtle eggs the vendors had collected prior to the signing of the agreement were to be removed immediately out of Sipadan Island (see cls. 5 and 6 of the agreement at p. 143 of the same record of appeal). There was also another agreement between the same parties whereby the vendors agreed to receive RM70,000 from the purchasers as *ex gratia* payment in return for abstinence not to pursue any claim against the purchasers for compensation for loss of income due to the presence of purchasers on the island. The point to be noted in respect of these two agreements is that for four years between 1993 to 1997, the plaintiff had already given up their rights to collect turtle eggs. However, as can be seen from the agreement they were compensated for it. Then in 1997, the island was declared as protected area and protected place. With the declaration, the plaintiff was no longer permitted to enter or be on the island to collect turtle eggs.

A **Abdillah's Claim On Damages**

[62] With regard to Abdillah's claim on right to collect turtle eggs, the plaintiff had not given any documentary evidence to support their claim. The only evidence is the evidence of oral testimony of PW1. But, again, there is no means of verifying accuracy as to the figures relating to the number of eggs collected because these are all based on personal experience of PW1 in collecting the turtle eggs with their family. In fact, in their submission before the Registrar, during the assessment of damages, the plaintiff conceded that they did not keep record of the number of eggs collected on daily basis.

[63] The next point which is very pertinent to the issue of damages to be awarded to both Ab Rauf and Abdillah for the loss of rights to collect turtle eggs is the fact that collection and sale of turtle eggs has become illegal since the coming into force of Sabah Wildlife Conservation Enactment 1997. This fact was not considered by the Deputy Registrar.

[64] The learned Deputy Registrar also, in our view had applied the wrong comparison when computing the quantum of damages. The learned Deputy Registrar had taken into consideration the fact that in Kuala Terengganu, a turtle egg could cost RM3 a piece. In this regard, we agree with the submission by the defendants that, assuming the plaintiff has a right to collect turtle eggs, the price for each egg should not be compared to the price in Kuala Terengganu because of the differences in circumstances. Furthermore, in their claim the plaintiffs stated the price of the eggs only at RM0.56 a piece.

[65] Finally, there is a claim by Abdillah for damages for loss of native customary right over his 2.5 acres of land on the island. For this claim, the Deputy Registrar had awarded Abdillah the sum of RM26.5 million. In our view, if at all the plaintiff is entitled to be compensated for the loss of NCR over the 2.5 acres of land, the sum awarded is manifestly excessive. The learned Deputy Registrar in our opinion had not given adequate judicial appreciation of the fact that under s. 70(2) of the Sabah Land Ordinance, all NCR land shall not be used for other than agricultural purposes. Of course, NCR land owner may apply to the Minister for permission to use the land for some purposes other than agriculture. However, it is reasonable to expect that if at all permission is given, there will be some conditions attached to it such as paying additional premium or quit rent. There is no evidence in this case that Abdillah had applied to the relevant authority for permission to convert the use of the land to some other purpose. In any case, approval for application to convert as to the usage of land remain uncertain.

[66] In awarding the sum of RM26.5 million to Abdillah for the loss of NCR over the land, the learned Deputy Registrar had given too much emphasis on the potential of the land, (or for that matter the whole island) to be developed into a tourist attraction. The learned Deputy Registrar recognised the fact that the island is a prime tourist destination. He also had taken into consideration that Abdillah had submitted a development plan to Majlis

Daerah Semporna for approval to develop the land. Another factor which the learned Deputy Registrar had taken into account is to take judicial notice of the value of land at Kampung Baru, Kuala Lumpur which he said is to be in the range of RM200 to RM350 sq feet.

[67] First of all, we think the comparison with land in Kampung Baru, Kuala Lumpur is inappropriate because of the surrounding circumstances and also because of the fact that the Sipadan island had been declared as protected area and protected place. Secondly, the development plan purportedly approved by Majlis Daerah Semporna has yet to materialise. Most probably the plan will not materialise in the light of the Island been declared as protected area and protected place. In the circumstances, we are of the opinion that it is not right to read too much into the potential of the land being developed as tourist resort or attraction since the restriction imposed by the declaration of the island as protected area and protected place is applicable to the whole island and not just the 2.5 acres belonging to Abdillah.

[68] Therefore, we agree with the submission by the defendants insofar as it relates to the damages to be awarded to Abdillah, if at all, on the loss of native customary right on the 2.5 acres land is only nominal.

[69] For the above reasons, we allow Appeals No. 47 and 48 in respect of native customary right and right to collect turtle eggs. We also allow Appeals No. 10 and 11 in respect of assessment of damages. We dismiss Appeal No. 49 in respect of Ab Rauf's claim for native customary right. As for costs, we award global costs of RM30,000 each against Ab Rauf and Abdillah to be paid to the State Government of Sabah. Deposit to be refunded to Ab Rauf in Appeal No. 49.